

Preston W. Small (Mr. Small), by his attorney, hereby submits the following statement concerning Mr. Small's December 5, 2001 *Petition for Reconsideration and Motion to Reopen the Record* concerning the Commission's November 8, 2001 *Memorandum Opinion and Order (MO&O)*, FCC 01-324 which denied Mr. Small's *Application for Review*. In support whereof, the following is respectfully submitted:

1) As discussed in the *MO&O*, at n. 1, the Commission considered Mr. Small's March 30, 2001 *Petition for Reconsideration* as an application for review. Undersigned counsel's reading of the rules, and case law, did not reveal that the Commission requires Federal Register publication, or other public notice of the filing of an application for review regarding an FM allotment rulemaking proceeding. Because no such public notice appears to be required under the rules,¹ counsel did not consider that Mr. Small must await Federal Register publication before filing his December 5, 2001 *Petition for Reconsideration and Motion to Reopen the Record* concerning the denial of the application for review nor did counsel's review of the rules and case law indicate that opponents could wait for a public notice of the filing of the December 5, 2001 *Petition for Reconsideration and Motion to Reopen the Record* before filing an opposition pleading. Given the fact that public notice of the filing of an application for review does not appear to be required, it seems to follow that succeeding pleadings relating to that application for review would similarly not require public notice.

2) On December 24, 2001, undersigned counsel contacted counsel to WNNX because no opposition to the December 5, 2001 *Petition for Reconsideration and Motion to Reopen the Record*

¹ 47 C.F.R. § 1.429(f) provides that a party may wait to file an opposition to a petition for reconsideration until after publication of a public notice of the filing of the petition. The section does not, on its face, apply to applications for review.

had been received; undersigned counsel had calculated the opposition filing date as being December 26, 2001. Undersigned counsel was concerned, *inter alia*, that WNNX's opposition pleading may have become delayed and/or lost because of the holiday mail and because the Post Office was battling the anthrax contamination problem in the D.C. mailing area. Counsel to WNNX was unavailable at the time of undersigned counsel's call, but he promptly left a voice message for the undersigned which indicated that he had received the December 5, 2001 *Petition for Reconsideration and Motion to Reopen the Record* and indicating that his reading of § 1.429 of the rules was that he could await a public notice concerning the filing of the December 5, 2001 *Petition for Reconsideration and Motion to Reopen the Record* before filing an opposition. To undersigned counsel's knowledge, to date there has been no public notice of the filing of Mr. Small's December 5, 2001 *Petition for Reconsideration and Motion to Reopen the Record*.

3) As discussed in Mr. Small's March 30, 2001 *Petition for Reconsideration and Request for Protection*, ¶¶ a.1-a.2, the Commission's rules provide that the Commission will issue Federal Register notices when actions alter rules and that publication is not required when the action merely affirms a final order and does not cause any rule alteration. The Commission's November 8, 2001 *MO&O* did not utilize the occasion to discuss this issue. Because the thirty day period after the release of the Commission's November 8, 2001 *MO&O* was soon expiring, and because no Federal Register publication had occurred, Mr. Small filed his December 5, 2001 *Petition for Reconsideration and Motion to Reopen the Record* in order to protect his litigating rights. As of today, it does not appear that the November 8, 2001 *MO&O* has been published in the Federal Register. Because the Commission's publication rules do not contemplate Federal Register publication of the denial of an application for review, and because Mr. Small filed his December 5,

2001 *Petition for Reconsideration and Motion to Reopen the Record* within 30 days after the release of the November 8, 2001 *MO&O*, rather than sit idle to see if a Federal Register publication might be made someday, Mr. Small's December 5, 2001 *Petition for Reconsideration and Motion to Reopen the Record* should be considered timely filed, and not premature, if the Commission ever does issue a Federal Register notice regarding the November 8, 2001 *MO&O*.

4) Regarding WNNX's decision to delay filing its opposition pending some kind of public notice of the filing of Mr. Small's December 5, 2001 *Petition for Reconsideration and Motion to Reopen the Record*, Mr. Small is not interested in obtaining a ruling that WNNX is precluded from filing an opposition pleading on the basis that WNNX's reliance upon § 1.429 is misplaced in matters relating to applications for review, assuming for a moment that Mr. Small's reading of the rules is correct. Mr. Small is interested in moving this proceeding along and Mr. Small is concerned that all parties, including WNNX, be able to file pleadings under procedural rules which are clear and do not act as booby traps for the good intentioned. Mr. Small is also concerned that this matter not become one where several, or many months, go by before the Commission determines that an opposition filing should be filed notwithstanding underlying procedural requirements. Therefore, Mr. Small requests that the Commission either a) issue a public notice announcing the filing of Mr. Small's December 5, 2001 *Petition for Reconsideration and Motion to Reopen the Record* (if it has not done so already) or, if publication is not required, b) advise WNNX and Mr. Small, by phone or letter, that WNNX should file an opposition within 10 days, plus three mailing days, of the Commission's notification.

5) We think that proceeding in the manner described herein is fair to all concerned. We look forward to prompt Commission action so that WNNX is able to file its opposition pleading thereby enabling Mr. Small to file his reply to close the pleading cycle.²

Hill & Welch
1330 New Hampshire Ave., N.W. #113
Washington, D.C. 20036
(202) 775-0070
(202) 775-9026 (FAX)
welchlaw@clark.net
January 2, 2002

Respectfully submitted,
PRESTON W. SMALL


Timothy E. Welch

His Attorney

² Undersigned counsel would be appreciative of receiving a FAX copy of the opposition (or phone notice to pick up a copy at WNNX's counsel's office) at the time WNNX files in addition to the mailed or hand served copy. Given the uncertainty of when the opposition will be filed, and the short reply time, proceeding in this manner would promote a prompt closure to the pleading cycle.

CERTIFICATE OF SERVICE

I hereby certify that I have this 2nd day of January 2002 served a copy of the foregoing STATEMENT FOR THE RECORD, MOTION FOR PROTECTION, AND REQUEST FOR A PROMPT ORDER DEFINING THE OPPOSING PARTY'S FILING RIGHTS, by First-Class United States mail, postage prepaid, upon the following:

Mark N. Lipp
Shook, Hardy and Bacon
600 14th Street, N.W. Suite 800
Washington, D.C. 20005-2004


Kathy Archer, Vice President
CapStar Broadcasting Partners
600 Congress Avenue #1400
Austin, TX 78701

Joan Reynolds
Brantley Broadcast Associates
415 North College Street
Greenville, AL 36037

James R. Bayes
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

Kevin F. Reed
Dow Lohnes & Albertson PLLC
1200 New Hampshire Ave., N.W. #800
Washington, D.C. 20036

Erwin G. Krasnow
Verner Liipfert Bernhard McPherson and Hand
901 15th Street, N.W.
Washington, D.C. 20005


Timothy E. Welch